No. 74-5822

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IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY OCTOBER TERM, 1975

CHARLES HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

OCTOBER TERM, 1974

No. 74-6322

CHARLES HUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1974. The petition for a writ of certiorari was filed on January 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether entrapment is established as a matter of law, regardless of predisposition, when contraband illegally sold by a defendant has been supplied by a government agent.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment and three years' special parole on each count. The district court suspended imposition of sentence and imposed a term of five years' probation. The court of appeals affirmed, one judge dissenting (Pet. App.).

1. The government's case was based primarily on the testimony of Jule Hutton, a government informer. The government's evidence established the following:

On February 25, 1974, Hutton informed Special Agent Terry Sawyer that petitioner was willing to sell a "boil" of heroin for $155 (Tr. 32). Hutton then arranged a meeting with petitioner for that evening (Tr. 33). At the meeting place, petitioner and Hutton entered the automobile of Agents Sawyer and McDowell and, following a brief conversation, petitioner removed his hat and took out a tinfoil package, which he passed to Sawyer (Tr. 35). When Sawyer opened the package, its contents began to spill out (Tr. 36-37). Petitioner retrieved the package, opened it, and returned it to Sawyer (Tr. 37). Sawyer then passed the package to McDowell for testing (Tr. 38). McDowell tested the substance and returned it to Sawyer who paid petitioner after a brief conversation as to price and future transactions (Tr. 39-40).

On the following day, petitioner pursuaded Hutton to accompany him to another meeting with McDowell and Sawyer (Tr. 42-43). At the meeting, petitioner removed another tinfoil packet from his hat and handed it to Sawyer who again had McDowell test it. Thereafter, McDowell placed petitioner and Hutton under arrest (Tr. 44).

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Hutton had been a special employee of the United States government from 1961 to 1965 and again from 1972 until the time of trial, during which time he had participated in approximately 40 or 50 narcotics cases (Tr. 54). At trial, Hutton said that his first conversation with petitioner concerning drugs had been initiated by petitioner (Tr. 48). Hutton's testimony was corroborated by Agents Sawyer and McDowell to the extent it concerned matters that they had observed (Tr. 65-109).

2. Petitioner, testifying in his own defense, claimed that he had proposed a plan to Hutton for the sale of a "pollutant" - a non-narcotic substance closely resembling heroin - to gullible acquaintances of Hutton (Tr. 118-121), and that Hutton supplied him with the pollutant, which was then sold to two friends of Hutton (Tr. 130-132). The "friends" turned out to be federal agents, and the "pollutant" turned out to be heroin. In rebuttal, Hutton testified that the idea of selling the heroin had been initiated by petitioner and that he, Hutton, had not provided petitioner with any substance or money (Tr. 173-174, 176).

3. Petitioner did not request a standard entrapment instruction, but instead requested an instruction that would have required acquittal, regardless of petitioner's predisposition, if the jury found that the heroin sold to the special agents had been supplied by Hutton. 1/ The court refused the requested instruction. The court did, however, submit to the jury the issue of scienter raised by petitioner's testimony, and the jury found petitioner guilty. The court of appeals affirmed.

1/ Petitioner requested the following instruction (Pet. App. 2):

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
> If you find that the defendant's sale of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

(Cont'd)

DISCUSSION

Petitioner here contends that he was entitled to the requested instruction on the theory that the government's furnishing of contraband would constitute entrapment per se, i.e., that it is a deprivation of due process to convict a defendant of selling contraband that was supplied to him by a government agent.

1. In our view, petitioner was not entitled to the instruction he requested or, indeed, to submission of any defense of entrapment to the jury. In United States v. Russell, 411 U.S. 432, 435, this Court reaffirmed that the defense of entrapment comes into play "only when the Government's deception actually implants the criminal design in the mind of the defendant." The Court ruled that, where the defendant was predisposed to commit the crime with which he was charged, the defense of entrapment is not available. See also Sorrells v. United States, 287 U.S. 435; Sherman v. United States, 356 U.S. 369. Petitioner here has conceded that he was predisposed to commit the offense of selling narcotics. See Pet. App. 7 and n. 5. Accordingly, he was not entitled to an instruction based upon the theory of entrapment.

2. In urging that his requested instruction should have been given to the jury, petitioner relies upon this Court's observation in United States v. Russell, supra, 411 U.S. at 431-432, that "we

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1/(Cont'd)

> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Petitioner contends that this case presents such a situation. But even if petitioner were able to show that the informer Hutton had supplied him with the narcotics that he subsequently sold, that fact would not bar his prosecution. This Court in Russell gave clear indication that the mere supplying of contraband does not constitute a constitutionally intolerable degree of participation in the criminal enterprise (411 U.S. at 432):

> * * *[I]n drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or to be "shocking to the universal sense of justice" * * *.

3. There is, however, disagreement among the courts of appeals concerning the issue raised by petitioner. Most of the courts of appeals that have considered the matter have concluded, like the court below, that the mere supplying of contraband by a government agent does not constitute entrapment per se or otherwise bar the defendant's prosecution. See United States v. Spivey, decided January 8, 1975, No. 74-1140 (C.A. 10) petition for a writ of certiorari pending, No. 74-5971; United States v. McGrath, 404 F. 2d 562 (C.A. 7); United States v. Johnson, 488 F. 2d 165 (C.A. 9), certiorari denied, 414 U.S. 1116. Cf. United States v. Fenton, 486 F. 2d 1262 (C.A. 2). On the other hand, the Fifth Circuit has determined that, notwithstanding the Russell decision, "the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband." United States v. Mosley, 496 F. 2d 1012, 1016. See also United States v. Gomes-Rojas, decided February 10, 1975, No. 74-1914 (C.A. 5); United States v. Oquendo, 490 F. 2d 161 (C.A. 5); United States v. Bueno, 477 F. 2d 903 (C.A. 5). The Third Circuit has now apparently joined the Fifth in this view. See United States v. West, decided February 25, 1975, No. 74-1279.

We believe that this conflict among the courts of appeals should be resolved by this Court. The question whether government agents are barred from furnishing contraband to participants in illegal ventures is one of considerable importance to effective law enforcement, for the furnishing of contraband may in some instances be the only practical means of infiltrating drug rings or of achieving effective surveillance of their resale activities. Moreover, since defendants frequently allege that government agents furnished them with the contraband that they later illegally sold, the question raised by petitioner affects a substantial volume of litigation. Accordingly, although we believe that the decision below is correct, we support petitioner's request for review.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK
Solicitor General

MARCH 1975.

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